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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STATE OF MISSOURI, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Respondents attempt to portray this case as nothing more than a routine desegregation case involving an unremarkable remedy that has been upheld on the basis of a straightforward application of this Court's desegregation precedents. That portrayal could not be more inaccurate. Instead, there are several distinct elements in this case that cause the holdings below to depart markedly from previous desegregation decisions.

First, there can be no question that, even though this case is and always has been an *intra*district case, the courts below have approved measures that require comparability on an *inter*district, and possibly even *nationwide*, basis [1] in standardized test scores as a condition of discontinuing court supervision. This expansive remedy has been rationalized by the establishment of imprecise twin goals: desegregative attractiveness and suburban comparability. These goals are designed to address conditions that in this case cannot, as a matter of law, be said to be vestiges of *de jure* segregation: "white flight" and system-wide "reduced" achievement.

Second, the educational improvement programs and other aspects of the remedy here are far broader than the "*Milliken II* programs" invoked by respondents and approved for the Detroit school system by this Court in 1977. While the programs ordered in *Milliken* v. *Bradley* were " 'only what is essential' " to provide a remedy to the immediate victims of *de jure* segregation, 433 U.S. 267, 277 (1977) (*"Milliken II"*) (citation omitted), the educational improvement programs now existing in the KCMSD "provide the KCMSD with facilities and opportunities *not available anywhere else in the country*." Pet. App. A-115 (emphasis added). And this lavish approach

[1] The courts below appear to have erected a nation-wide standard for the adequacy of KCMSD student achievement, applying, for example, the criterion that "the District is still at or below national norms at many grade levels." Pet. App. A-131.

was conceived and continued with no real attempt to link its elements to addressing harm suffered by any actual victims of segregation, and without any attention to whether disparities currently exist between the educational opportunities available to black and white schoolchildren.

In response, respondents and the government urge the Court to dismiss the writ as improvidently granted. This is not surprising; respondents cannot defend the excesses of the courts below. Though this Court properly may resolve the issues presented on a narrower basis, the Court may and should resolve the more fundamental issues now. Otherwise, questions concerning the lower courts' flawed remedial goals will resurface as the State pursues unitary status, with the probable effect of further expanding and prolonging the sweeping remedy.

Finally, although respondents attempt to blur the distinction between the violations found on the part of the State and those of the District,[2] the remedy at issue here operates against the *State*, which has not condoned a *de jure* segregated school system since 1954,[3] and which has

[2] For example, the Jenkins respondents assert that "as a consequence of *the defendant's* violations and their financial effects, the KCMSD's schools had 'literally rotted.'" Jenkins Br. 11-12 (quoting J.A. A-219, 237) (emphasis added). The Jenkins respondents apparently intend "the defendant" to refer to the State. But the court found that "the deterioration of the KCMSD facilities is due to deferred maintenance *by the KCMSD*." J.A. A-220 (emphasis added).

[3] The Jenkins respondents emphasize that "[t]he Missouri Constitution continued to require segregated schools until 1976," Jenkins Br. 16, but omit to mention that in *1954* the Missouri Attorney General declared the constitutional provision and related statutes void and unenforceable. J.A. A-19. In a similar distortion, the Jenkins respondents claim that after 1954, the State "never enforced Title VI in schools with respect to race." Jenkins Br. 17 n.18. In 1979, however, the Office of Civil Rights of the United States Department of Health, Education and Welfare certified the KCMSD's compliance with federal school desegregation requirements under the broad discriminatory-effects standard in Title VI of the 1964 Civil Rights Act. Mem. Op. of June 14, 1985, J.A. A-81.

spent some $960 million over the past 10 years to fund the grossly excessive court-ordered remedy. As the district court has recognized, the school districts in Missouri "are more autonomous than those discussed in *Milliken* and numerous other desegregation cases." Order of June 5, 1984, J.A. A-727; see *id.* at A-730-31; State Br. 6. Thus, the KCMSD was actually running the schools and enforcing the constitutionally infirm policies. The court nonetheless found the State liable for failing to act affirmatively to eliminate the dual school system, thus "contribut[ing] to an atmosphere" that tolerated the violations. Order of Sept. 15, 1987, J.A. A-220.

Against this background, the decisions below must be reversed because the funding they order is based on a desegregation remedy that has become unmoored from its only legitimate purpose, to undo the vestiges of *de jure* segregation within the District and thereby ensure equality of opportunity for students of all races. The District suggests that absent a request by the State that this Court declare partial unitary status, the "request that the Court simply 'reverse' the decisions below makes no sense." KCMSD Br. 50. That assertion, like the District's entire argument in part I of its brief, misses the point.

The State does not seek from this Court a declaration of partial unitariness. What the State does argue in seeking reversal of the rulings below is that the lower courts have departed from this Court's desegregation rulings in two related respects. First, courts are constitutionally compelled to scrutinize the challenged conditions and their causes to ensure that "vestiges" have—and continue to have—the requisite "causal link" to the constitutional violation sought to be remedied. *Freeman* v. *Pitts*, 112 S. Ct. 1430, 1448 (1992). That direct relationship is lacking between the intradistrict violation and the court-identified "vestiges" of "white flight" and system-wide "reduced" student achievement. Second, courts must take care to impose remedial measures that are designed to address those specific vestiges. In this case, which is indisputably an *intra*district case, the courts' goals of

desegregative attractiveness and suburban comparability do not meet this test. *Cf. Milliken II*, 433 U.S. 267 (1977). Because the determinations underlying the courts' funding orders are thus inherently flawed, it manifestly "makes sense" that those orders be reversed. Moreover, the remedial orders are grossly overbroad even for the purpose of achieving the impermissible goals adopted by the courts below, and also should be reversed on that ground.

I. THE ORDERS AT ISSUE CANNOT BE EVALUATED FAIRLY WITHOUT A RECOGNITION THAT THE ELEMENTS OF THE REMEDIAL PLAN AT ISSUE IMPERMISSIBLY GO FAR BEYOND THEIR ONLY LEGITIMATE PURPOSE OF ELIMINATING THE VESTIGES OF *DE JURE* SEGREGATION.

Respondents' conclusion that there is no constitutional flaw in the sweeping remedy is merely the tautological result of their basic assumption that the ongoing measures ordered by the courts below are necessary to eliminate the vestiges of *de jure* segregation. But it is this very *assumption* that warrants scrutiny. As the State has shown, the courts below have failed both in interpreting what may properly be considered a "vestige," and in fashioning a remedy appropriately designed to address whatever vestiges may exist. The extraordinary scope and attendant expense of the remedial measures urged by respondents and ordered by the courts below demonstrate the danger of disregarding the bounds of federal judicial authority in a desegregation case.

Respondents and the government insist that consideration of the underlying scope of the remedy is beyond the reach of the questions presented.[4] That insistence is dis-

[4] For the first time in its response, the KCMSD asserts—half-heartedly—that the issues raised in this appeal were never raised below. KCMSD Br. 21. Although claims of waiver must be presented in the brief in opposition or be waived, *City of Canton* v. *Harris*, 489 U.S. 378, 383-84 (1989), the KCMSD did not make a waiver argument in its opposition to the State's petition for a writ

ingenuous, at best. Plainly, the Court legitimately can consider whether the courts below erred in approving funding for ongoing aspects of the desegregation remedy by examining the lawfulness of that remedy. Because the opinions below represented merely incremental budgetary approvals, they do not contain the full rationale behind the decisions. It is therefore completely proper to look beyond the four corners of those decisions and scrutinize the reasoning and determinations that underlie them. Such an inquiry is "essential to analysis" of the decisions below, and presents issues " 'fairly comprised' by the question[s] presented." *Procunier* v. *Navarette*, 434 U.S. 555, 559-60 n.6 (1978) (citation omitted). "Far from being an improper invitation to go outside the question presented, attention to the extraordinary remedy here is the Court's duty." *Missouri* v. *Jenkins*, 495 U.S. 33, 80 (1990) (Kennedy, J., concurring in part and concurring in judgment).[5]

of certiorari. In fact, the State has challenged the scope of the remedy repeatedly, as all parties to this protracted litigation are aware. Thus, the core issue of the appropriateness of the remedial measures is implicated in each and every funding decision, including the funding decisions that underlie the petition.

In addition, respondents and the government repeatedly emphasize that the State did not appeal certain earlier findings or rulings establishing various components of the remedy. *See, e.g.*, KCMSD Br. 6-9, 21; Jenkins Br. 27; U.S. Br. 13. That argument is frivolous; this Court is free to evaluate any preceding aspect of the case, and is not bound by "law of the case." *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) ("[a] petition for writ of certiorari can expose the entire case to review") (citation omitted). *Arizona* v. *California*, 460 U.S. 605, 618 (1983), cited by the District, KCMSD Br. 42, is not to the contrary. In that case, this Court held that it would not reexamine a ruling previously made by the *Court itself*, 460 U.S. at 616-18, because the case concerned rights in real property, *id.* at 620, and "turn[ed] on statutory rather than Court-fashioned equitable criteria." *Id.* at 619.

[5] The State has not, as respondents suggest, argued that the decisions should be reversed because of clearly erroneous factual findings. Though the facts are, of course, crucial to the examination of this unprecedented desegregation remedy, this Court need

A. The Court-Ordered Remedy Exceeds The Scope Of The Constitutional Violation, Which Was Intradistrict In Nature.

1. The district court's implicit conclusion that the KCMSD has not achieved partial unitary status with regard to its "quality education" programs is based on its fundamentally flawed imposition of an unprecedented *inter*district remedy in an *intra*district school desegregation case. That misbegotten remedy, approved by the Eighth Circuit, derogates this Court's mandate that a desegregation remedy must be tailored to fit the constitutional violation. *Milliken II*, 433 U.S. at 280; *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

This is an intradistrict case. Appreciating that this remedy can be sustained only on the basis of interdistrict liability, respondents insinuate (but cannot show) that there were findings against the State of an interdistrict violation. To do this, the Jenkins respondents, in particular, distort the record. They assert that the district court found that the State "literally paid for thousands of white families to leave [the KCMSD]," Jenkins Br. 41, and that "neither Missouri nor the KCMSD appealed the findings that they segregated schools and housing in the Kansas City area from 1865 to 1984 and that their violations concentrated black children inside and white children outside the KCMSD." Jenkins Br. 20; see also *id.* at 23; *cf.* KCMSD Br. 43. No such "findings" are cited, and none exists. To the contrary, the district court deter-

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not reverse any findings of fact to reverse the decisions below. What respondents (and the courts below) have characterized as findings of fact either are nonexistent, *see infra* pp. 15-16, or are nothing more than *legal* conclusions that include statements regarding factual issues. See *infra* p. 18; J.A. A-23. "[I]t is important to discriminate between more or less subordinate facts leading to a judgment of their legal significance, and a conclusion—though concurred in by two courts—that may in fact imply a standard of law on which judgment on the case in its entirety is based." *Offutt* v. *United States*, 348 U.S. 11, 15 (1954) (citing cases). The Court obviously is free to review such "conclusions" and to determine whether the claimed factual findings actually exist.

mined "that *none* of the allegedly discriminatory actions committed by the State or federal defendants had caused any significant current interdistrict segregation." *Jenkins* v. *Missouri*, 807 F.2d 637, 662 (8th Cir. 1987) (emphasis added). See generally State Br. 6-7.

The KCMSD goes even further, making the incredible assertion that "the State's claim that the effect of the underlying violation is 'solely intradistrict in scope' is incorrect." KCMSD Br. 43 (quoting State Br. 14). But while the district court's

> order admittedly emphasizes the absence of culpability of the suburban districts . . . . the court explicitly recognized that under *Milliken* "there must be evidence of a constitutional violation in one district that produces a significant segregative effect in another district" . . . . [and] noted that only the schools in one district were affected and that the remedy must be limited to that system.

807 F.2d at 672 (affirming finding of lack of interdistrict liability) (quoting Order of June 5, 1984, J.A. A-810); see also *id.* at 671.

2. To guide federal courts in determining the appropriate extent of their displacement of local control over school districts, this Court has identified six facets of school operations that are reasonably susceptible of objective evaluation. See *Green* v. *County Sch. Bd.*, 391 U.S. 430 (1968). Respondents are incorrect in asserting that the State seeks to transform the "*Green* factors" into a rigid *per se* test. KCMSD Br. 26; Jenkins Br. 31-33; see also U.S. Br. 16-17. To the contrary, the State's fundamental position is that the *Green* factors' measurement of *intra*district remedial authority has been virtually ignored in the lower courts' headlong rush to an interdistrict remedy. Use of the *Green* factors is of central importance in conforming desegregation remedies to the underlying constitutional violation. See *Milliken II*, 433 U.S. at 283. Supplanting these factors with the lower courts' goals of desegregative attractiveness and suburban comparability

signals a perilous deviation from the constitutionally permissible course. See State Br. 29-30.[6]

While courts may certainly take other appropriate factors into consideration in applying their equitable powers, see *Freeman* v. *Pitts*, 112 S. Ct. 1430, 1446 (1992), attempts to produce desegregative attractiveness and suburban comparability through a plethora of State-funded measures range far afield of the analysis of "*Green*-type factors," *id.* at 1454 (Souter, J., concurring), appropriate in an intradistrict case. Contrary to the impression respondents seek to convey, the courts below have not merely appraised a pertinent element in addition to the *Green* factors; rather, they have abandoned wholesale any effort to address the only legally relevant issue: whether racially identifiable schools exist in the KCMSD as a result of pre-1954 *de jure* segregation.

3. Respondents and their *amici*, like the courts below, gauge the "effectiveness" of the vast court-ordered remedial measures by "goals" that are tied—if at all—in solely a rhetorical sense to the State's constitutional violation. These goals—"desegregative attractiveness" and suburban comparability—are far from the "rather precise statement of [the State's] obligations" required of desegregation

[6] The State has not, as the District claims, argued "that the 'well settled approach of *Green* makes no provision for' considering educational harms." KCMSD Br. 26 (quoting State Br. 20); *accord*, U.S. Br. 17. Rather, the State asserted that the proper approach "makes no provision for comparing overall 'student achievement' standards within the KCMSD to some national (or even suburban) standard or to some unstated level of improvement." State Br. 20. *See infra* pp. 18-19. Educational harms that are *caused by the prior dual school* system clearly require correction under *Milliken II*. But because the programs at issue here go far beyond addressing educational harms to victims of constitutional wrongs, they are inherently different from the programs approved in *Milliken II*. Thus, there is simply no basis for the government's declaration that reversing the decisions below "would require this Court to overrule *Milliken II*." U.S. Br. 17. Rather, it is respondents whose position would require that result, as it would render meaningless *Milliken II*'s fundamental requirement that the remedy be tied to the constitutional violation.

decrees. *Board of Educ.* v. *Dowell*, 498 U.S. 237, 246 (1991); see also *Freeman*, 112 S. Ct. at 1444. Instead of providing fair and precise guidance, the courts repeatedly have modified their conclusions regarding the scope of the appropriate remedy,[7] and have adopted a variety of remedial measures without regard for the equitable "balancing [of] individual and collective interests." *Swann*, 402 U.S. at 16. Those measures wrongly curtail the State's traditional decision-making about how to spend limited taxpayers' dollars.[8]

Respondents' approach disregards the appropriate nature and purpose of a desegregation remedy. As this Court made clear in *Dowell* and *Freeman*, such remedies are intended as *temporary* measures to eliminate as much of the effects of earlier *de jure* segregation as practicable.[9]

[7] The goals established by the courts are not only unclear in what they require, but also inconstant. As an example of the "moving target" nature of the courts' analysis, after the State had demonstrated that the schools in the KCMSD provided educational opportunities superior to those afforded by the majority of suburban school districts, *see* J.A. A-452, the court altered its "suburban comparability" goal, instead requiring achievement on standardized tests at the level of *national* norms. Pet. App. A-131.

[8] Respondents seem to believe that the State must forever be required to fund whatever measures respondents and the courts below believe desirable because the State has previously "endorse[d]" and "proposed" a number of the educational improvement programs that were ultimately adopted. Jenkins Br. 8 (citing J.A. A-59, 61); KCMSD Br. 5-6. The State's agreement ten years ago to help fund such programs does not mean either that (1) the State is *now* foreclosed from challenging the unjustified *continuation*, much less the *expansion*, of those programs, or (2) that the State ever agreed that the programs were *constitutionally* required.

[9] Respondents and the government make much of the district court's expressed intent to discontinue the desegregation plan in the next 3 to 10 years. KCMSD Br. 29; Jenkins Br. 49; U.S. Br. 21. What none of them mentions, however, is that the court's "phase-out" plan *requires* permanent funding "at a level commensurate with the current funding or at least at a level where the same quality . . . may be maintained." Pet. App. A-140-41; *see also Jenkins* v. *Missouri*, 23 F.3d 1297, 1301 (8th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3181 (U.S. Aug. 31, 1994) (No. 94-434).

Freeman, 112 S. Ct. at 1445; *Dowell*, 498 U.S. at 247-48. When that has occurred, and the defendant has "demonstrated . . . its good faith commitment to the whole of the court's decree," *Freeman*, 112 S. Ct. at 1446, the federal courts' displacement of local control *must* come to an end. Respondents dispute the State's good faith, apparently relying on the fact that the State repeatedly has opposed the more grandiose elements of the "remedial" plan of the plaintiffs and the District.[10] Respondents cannot seriously contend, however, that the actions of the State in challenging—in a judicial forum—the excesses of this plan demonstrate a lack of good faith of the sort denounced in *Dowell* and *Freeman*.[11]

In fact, as respondents acknowledge, the State participated in good faith in proposing measures to effectuate the court-ordered plan, including "effective schools" programs, a class-size reduction program, a summer program, a "carefully defined and comprehensive" early childhood

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Obviously, this is no "phase-out" at all. Nor is mention made of the District's response to the court's suggestion: "KCMSD understands that the Court has not called for it, in the context of its Financial Plan, to 'plan' at this time for any fundamental alterations to the Court's desegregation remedy over the next ten years . . . ." KCMSD Fin. Plan Filed in Resp. to Apr. 16, 1993, Order, Doc. No. 3516 (Aug. 3, 1993) at 8.

[10] Respondents claim that the magnet schools were not fully operational until sometime in the last three years, Jenkins Br. 36; KCMSD Br. 30, and therefore insufficient time has passed to judge the State's good faith. This is misleading. The magnet schools are only one element of the courts' scheme. The heart of the remedial components, the quality education programs, have been in place since 1985, and have been fully implemented since 1988. Moreover, this accusation ignores the fact that the courts' magnet schools requirements have expanded over time.

[11] The State has *never*, for example, acted to alter boundary lines to evade the desegregation decree or otherwise obstruct the remedial plan. *See North Carolina State Bd. of Educ.* v. *Swann*, 402 U.S. 43, 45 (1971) (rejecting antibusing law as unconstitutional obstruction to court-ordered desegregation); *Wright* v. *Council*, 407 U.S. 451, 465 (1972) (city's attempt to avoid desegregation command by establishment of a separate school system not permissible).

development program, J.A. A-74, full-day kindergarten, and after-school tutoring programs. Jenkins Br. 8-9; see also KCMSD Br. 5-6; Order of Jan. 7, 1988, at 14-15 (district court "acknowledges that progress in achieving a voluntary interdistrict transfer program has been slow, but finds that it is not because of a lack of effort by the State defendants"). Moreover, it cannot be disputed that the State's exemplary 10-year "record of compliance," *Freeman*, 112 S. Ct. at 1446, includes consistent provision of the hundreds of millions of dollars held necessary to fund the "quality education" component of the desegregation remedy alone.

The temporary nature of desegregation remedies derives directly from the value our governmental system places on local control over education. *Id.* at 1445. If local school authorities make different decisions about educational priorities than the federal court would have made, or find their taxpayers unwilling to support programs at the prior, State-funded level,[12] those are not issues with which a federal court has any legitimate concern. Education is not, of itself, a fundamental right. *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 458 (1988); *San Antonio Sch. Dist.* v. *Rodriquez*, 411 U.S. 1, 35 (1973); see also J.A. A-482. Because the immense scope of the remedial plan imposed by the lower courts in this case is not constitutionally required,[13] the courts

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[12] The KCMSD's anxiety about "how the voluntary remedy could continue to make progress in desegregating student enrollment if the basic quality of education were plunged back to 1984 levels," KCMSD Br. 20, may be misplaced for an additional reason: respondents' *amicus* The Civic Council, which describes itself as including "several of the KCMSD's major property taxpayers," "strongly supported the tax increase" that was at issue the last time this Court considered this case. Civic Council Br. 4.

[13] For example, the district court rejected the State's proposed $61 million capital improvement plan because it "only estimate[d] the capital improvements necessary to eliminate health and safety hazards and to provide a good learning environment." J.A. A-220-21. Instead, the capital improvements plan was budgeted in 1988 for $265 million, *id.* at A-218, an amount deemed necessary not only to correct health and safety problems, but also to ensure that there

below lack authority to impose it, or to require the State to pay for it. *Cf. Missouri* v. *Jenkins*, 495 U.S. at 76 ("[i]t cannot be contended that interdistrict comparability . . . is itself a constitutional command") (Kennedy, J., concurring in part and concurring in judgment).

B. The Remedy Is Fundamentally Flawed Because It Is Designed To Cure Conditions That Are Not, As A Matter Of Law, "Vestiges" Of *De Jure* Segregation.

1. By seeking to shift the focus onto the question of whether the State had proved "that the vestiges of segregation in the District . . . had been remedied to the extent practicable," KCMSD Br. 20, respondents put the cart before the horse. This approach bypasses the fundamental legal question of what the vestiges of *de jure* segregation in Kansas City are, and similarly skirts the question whether existing remedial measures are adequately tailored to cure those vestiges. The Court must first determine whether the asserted "vestiges" are truly direct remnants of the State's unconstitutional actions in mandating a dual school system before 1954; if not, there plainly can be no constitutional obligation to remedy them.

The Constitution does not permit a court's approach to defining what is a "vestige" of *de jure* segregation to become—as it has here—a freewheeling identification of those elements of the school system or community that the court wishes to improve. See *Milliken II*, 433 U.S. at 280-82. And it is well established that federal court decrees are unnecessary "if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation." *Id.* at 282 (citation omitted).

2. This Court has made plain that the vestiges to be cured by a desegregation remedy must be proximately

would be no "floor coverings with unsightly sections of mismatched carpeting and tile, and individual walls possessing different shades of paint." *Id.* at A-221. Such lavish attention to detail is hardly constitutionally required.

linked to *de jure* segregation. *E.g.*, *Freeman*, 112 S. Ct. at 1448. Superficially, respondents agree with this well settled proposition. See Jenkins Br. 34; KCMSD Br. 35. Their approach, however, like that of the courts below, expands the concept of proximate causation to untenable proportions.[14]

Respondents seek comfort in *Milliken II*, in which this Court recognized that where children have been "educationally and culturally set apart from the larger community," they may "acquire habits of speech, conduct and attitudes reflecting" that isolation, at which education programs properly may be directed. 433 U.S. at 287 (quoted in Jenkins Br. 34). But as the very language quoted by respondents demonstrates, the vestiges of *de jure* segregation that are to be cured by federal court intervention are those disparities that are directly connected to the incidence of *de jure* segregation itself, and that have demonstrated effects on *minority* students.[15]

[14] In another of their pervasive attempts to mischaracterize the State's argument, the Jenkins respondents claim that the State has argued, citing *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977) ("*Dayton I*"), "that plaintiffs have the burden of demonstrating the causal link between existing conditions and past *de jure* segregation." Jenkins Br. 36-37 (citing State Br. 34 & n.22). It may be that the time has come to consider such burden-shifting. *See Freeman*, 112 S. Ct. at 1453 ("At some time, we must acknowledge that it has become absurd to assume, without any further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon current operation of schools") (Scalia, J., concurring). Nevertheless, that was not the State's argument. The page in the State's brief that the Jenkins respondents cite does not even mention *Dayton I*, and the discussion contained in that section concerns the importance of proximate causation in this context.

[15] The government contends that "petitioners were required to show initially, not only that the *Milliken II* programs had been fully implemented, but also that the systemwide reduction in student achievement attributable to prior segregation had, as a result, been eliminated to the extent practicable." U.S. Br. 15-16. This approach contrasts dramatically with the position the government advocated the last time it addressed that question before this

It is far from surprising that in 1977, when this Court heard *Milliken II*, there were still some children in the Detroit school system exhibiting the sorts of "[r]eading and speech deficiencies," *id.* at 290, that result from an inferior, segregated education. This case, by contrast, arises 18 years after *Milliken II*, and 30 years after Missouri ceased requiring racially separate schools.[16] Plainly, "[a]s the *de jure* violation becomes more remote in time and . . . demographic changes intervene, it becomes less likely that a current [condition] in a school district is a vestige of the prior *de jure* system," *Freeman*, 112 S. Ct. at 1448, a proposition with which the government agrees. See U.S. Br. 19.[17] The Jenkins respondents oppose this common-sense notion, arguing that the passage of time is relevant *solely* to the defendant's good faith. Jenkins Br. 35. This is simply wrong.

3. Respondents argue that the district court made a "factual finding" that "white flight" was a vestige of segregation, and that this finding was "never appealed as erroneous." Jenkins Br. 42; see also KCMSD Br. 43. But the district court's statement that it previously "found that segregated schools . . . [have] led to white flight from

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Court: "Although it certainly may be permissible to institute" *Milliken II* programs to deal with education deficits traceable to the *de jure* system "in the first instance, . . . to maintain jurisdiction until such amorphous effects are eliminated is to guarantee that federal court supervision will operate virtually in perpetuity." Brief for the United States as *Amicus Curiae* Supporting Petitioners at 16 n.9, *Freeman* v. *Pitts*, 112 S. Ct. 1430 (1992) ("U.S. *Freeman* Br.") (citations omitted).

[16] "Missouri's violation in this case" was *not* "in full swing in 1984," as the Jenkins respondents assert. Jenkins Br. 36. The district court found that in 1984, the *KCMSD* had "not entirely dismantled the dual school system." J.A. A-25. And the court rejected the bulk of plaintiffs' arguments that the State's conduct since 1954 had affected housing patterns or otherwise limited desegregation. *See* J.A. A-43-44.

[17] The government mischaracterizes the State's argument as urging a "conclusive presumption" that all causal links are broken by the passage of time. U.S. Br. 19. The State counsels no such conclusive presumption.

the KCMSD," J.A. A-126, is not itself a finding of fact.[18] Nor was there *ever* any such finding. To the contrary, the district court recognized that "white flight" is more accurately termed a "vestige" of desegregation.[19] See, *e.g.*, J.A. A-239 (citing "an abundance of evidence that many residents of the KCMSD left the district and moved to the suburbs because of the district's efforts to *integrate* its schools") (emphasis added).[19]

The Jenkins respondents now attempt to "prove" through flagrant misrepresentation of the record that "white flight" resulted from segregation. In doing so, they offer theories and factual allegations that the district court has long since rejected, and never relied upon.[20] The simple fact is—regardless of what belief the district court and court of appeals may now embrace—no factual

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[18] *See supra* note 5; State Br. 37 n.25. Contrary to the Jenkins respondents' baseless claim, *see* Jenkins Br. 41, the State certainly has never "acknowledge[d]" that any such factual finding exists.

[19] Similarly, the district court never found, as respondents claim, that "defendants' violation . . . concentrated black children inside and white children outside the KCMSD." Jenkins Br. 3; *cf.* KCMSD Br. 43. Rather, the district court found that under the pre-1954 dual school system, the movement of "some blacks . . . to districts, including the KCMSD, that provided black schools . . . was insignificant when compared to the total black enrollment in the KCMSD." J.A. A-19; *see also id.* at A-20 (black migration product of "a host of factors").

[20] *Compare, e.g.*, Jenkins Br. 41-42 (claiming the district court found the KCMSD's liberal transfer policy to be segregative) *with* J.A. A-25 (district court finding that "the liberal transfer policy was not adopted or maintained to foster segregation"); Jenkins Br. 41-42 (citing as a court finding that white flight occurred in part because of state "agencies' 'blatantly' racially-steered relocations of persons displaced by urban renewal and highway construction") *and id.* at 15 (referring to "numerous" "actions by state officials that continued into the 1970s and were 'intended to cause housing segregation'") (purporting, apparently, to quote court finding not evident at or near J.A. cite provided) *with* J.A. A-45 (district court finds no "evidence whatsoever that the state agencies exercised coercive power or significantly encouraged [private discrimination]" in the areas of real estate, financing, insurance, and public accommodations).

finding has ever been made in support of the courts' current styling of "white flight" as a vestige of *de jure* segregation. And for the reasons stated in the State's opening brief, such a characterization profoundly distorts the concept of proximate causation. See State Br. 37-39.

4. Nor have respondents demonstrated how "reduced" achievement of black *and* white students system-wide could be a vestige of segregation. The Jenkins respondents emphasize the district court's conclusion that "[o]verall, the violation and its financial effects on the KCMSD produced a 'system-wide reduction in student achievement.'" Jenkins Br. 21 (quoting J.A. A-58). But, like the courts below, they nowhere explain how such a "system-wide" effect can be a vestige of segregation.

The KCMSD thoroughly mischaracterizes the State's argument by claiming the State contends "that educational harms *as a matter of law* cannot be a vestige of segregation." KCMSD Br. 45. The State has made no such claim, nor has it ever questioned that "[w]here the remedy is properly tailored to the constitutional violation, courts may . . . require special remedial programs for the students directly harmed by racial segregation." State Br. 41 (citing *Milliken II*). But that responsibility does *not* give federal courts license to erect expensive long-term programs to counteract perceived "reduced" scholastic achievement for *all* students in the District—including those who could not even remotely have been injured by earlier *de jure* segregation. Neither respondents nor any of their *amici* have come close to explaining in what way measurement of *system-wide* achievement—which lacks any scrutiny of the educational opportunities provided for *black* students as compared to *white* students within the school district—is related to any inferior educational opportunities offered to black schoolchildren under the dual school system that existed decades ago. See State Br. 41 n.27.[21]

[21] The government's position parallels strikingly that of respondents when it argues that "a reduction in student achievement" should be held to "flow from [the constitutional] violation," U.S. Br. 16-17 (internal quotations omitted), but makes *no* mention of how "reduced" achievement system-wide possibly relates to acts that "had caused *minority school children* to suffer significant deficiencies in basic educational skills." *Id.* at 17 (emphasis added). Also like respondents, the government relies on the district court's unsupported statement that "white flight" was a vestige of segregation (rather than of desegregation). *Id.* at 19 n.2. This relaxed approach to the proper identification of a vestige contrasts sharply with the government's position before this Court in *Freeman* v. *Pitts* four years ago: "'[v]estiges' . . . are best understood as 'remnants': they must not only have been caused by the dual school system, but themselves have been a part of the dual school system . . . . [D]esegregation decrees are not properly designed to alter features not inherent in the school system, such as uneven residential distribution or disparities in income." U.S. *Freeman* Br. 13-14.

5. Respondents can point to no factual basis in the record to link existing salary levels in the KCMSD to an earlier constitutional violation by the State. Respondents make a hopelessly attenuated argument that because of "white flight," the tax base in the KCMSD was diminished, and salaries therefore suffered. Jenkins Br. 29; KCMSD Br. 49. This stretch of imagination is unavailing. As shown above and in the State's opening brief, there is simply no basis for concluding here that "white flight" is a consequence of *de jure* segregation. See *supra* pp. 14-16; State Br. 37-40. Moreover, there is no evidence of any direct link between the State's actions before 1954 and the salaries the KCMSD has negotiated with the teachers' unions. The across-the-board salary increases ordered by the courts below therefore are not a proper exercise of the courts' authority to eliminate "vestiges" of segregation to the extent practicable.

II. THE COURTS BELOW REQUIRED IMPERMISSIBLE MEANS FOR ACHIEVING THE STATED GOALS, EVEN MEASURED AGAINST THOSE GOALS ON THEIR OWN TERMS.

The funding ordered in the decisions below is earmarked for educational programs designed to raise scores on standardized tests system-wide and for across-the-board

salary increases in the KCMSD. Even if the "goals" of this remedial plan were constitutionally authorized—which they are not—these funding orders are unlawful because the measures they enable are not sufficiently related even to those flawed goals.

Respondents now claim that "improved test scores, as measured by national averages," are not required by the remedy as currently interpreted and imposed, although the District has an "internal goal" of standardized test scores at or above the national norm.[22] KCMSD Br. 34-35 (citations & internal quotations omitted); see also Jenkins Br. 25-26. To support this, the District provides a selection of inquiries it says may shed light on whether "educational vestiges have been eliminated." KCMSD Br. 37-38. The District's list includes comparisons between white and black schoolchildren with respect to: suspension rates, placement in remedial or honors classes, teacher attitudes and practices, attendance, grades, drop-out rates, post-secondary enrollment, and test scores. *Id.* But these criteria—with the sole exception of test scores—*do not appear in the district court's (or court of appeals') decisions.*[23]

The court of appeals when challenged may have denied that standardized test scores were the only relevant consideration in the district court's decision, but as the judges

[22] Below, by contrast, respondents argued vigorously that "[f]or the State to receive a declaration of partial unitary status on the educational components . . . it must show that achievement overall has increased." Appellees' Resp. to Pet'n for Reh'g at 6; *see also* J.A. A-436-38; KCMSD App. Br. 2, 5, 6, 23-26. Respondents relied *exclusively* on test scores in making their point about "achievement."

[23] This case does not present the question whether such inquiries are appropriate because *they were never made.* And ironically, the inventory of school operations the District provides consists exclusively of matters that the *District* controls in its sole discretion. Therefore, an outcome-based standard cannot be used fairly to continue to hold the *State* responsible for providing massive funds to the District based upon a "failure" to produce "results" over which the *District* has exclusive control.

dissenting from that court's denial of rehearing *en banc* made plain, "[t]he only factor the district court saw standing in the way of unitary status for the educational programs was continued below average academic performance. Indeed, no other evidence in the record supports a conclusion that the education enhancement . . . program of the KCMSD is wanting." Pet. App. A-60-63 (discussing evidence).[24] Moreover, when the lower courts used the only criterion applied—test scores—they did not compare the achievement between white and black schoolchildren (as respondents now assert is appropriate); instead, they measured achievement of *all* students against unspecified national standards.

Respondents make no real attempt to defend the courts' approval of salary increases for *all* employees of the KCMSD. They simply repeat the conclusory determinations of the courts below "that salary relief was 'a necessary component of the desegregation program.' "[25] Jenkins Br. 28 (citation omitted); see also KCMSD Br. 6. Salary increases were originally ordered "to fund *teacher* salary increases," J.A. A-234-35 (emphasis added), and the decisions below are devoid of any explanation of why main-

[24] The District and the government claim that the State has the burden of showing that factors other than past *de jure* segregation "account for continuing deficiencies" in the KCMSD. U.S. Br. 13; KCMSD Br. 23. But this would be true only if the plaintiffs had shown "continuing deficiencies" that were truly vestiges of the State's former dual school system in the first place. But—despite the appellate court's and respondents' protests to the contrary—the *only* "continuing deficiency" identified by the court and relied upon by the plaintiffs was the failure of some students, both black and white, in the KCMSD to achieve standardized test scores at the national average. Because that shortcoming is improper as a measure of the effects of quality education on minority students (the only KCMSD students who might be said to be victims of prior segregation), it does not relate to a true vestige of segregation. Thus, the State does not bear the burden of countering it.

[25] This is not a factual finding at all, *cf.* Jenkins Br. 28; KCMSD Br. 41, but rather, a legal conclusion that "involve[s] the very basis on which judgment . . . is to be made." *Baumgartner* v. *United States*, 322 U.S. 665, 671 (1944). *See supra* note 5.

taining salaries at increased levels for employees who are *not* teachers should be in any way "necessary" to satisfy even the questionable goals set by the lower courts.[26]

CONCLUSION

For the foregoing reasons, together with the reasons set forth in the State's opening brief, the judgments below should be reversed.

Respectfully submitted,

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[26] The KCMSD denies the importance of the court's desegregative attractiveness rationale to the orders raising salaries for non-instructional employees. KCMSD Br. 48 (quoting State Br. 43). This is incorrect: "[T]he basis for this Court's ruling is grounded in remedying the vestiges of segregation by improving the desegregative attractiveness of the KCMSD. In order to improve the desegregative attractiveness of the KCMSD, the District must hire and retain high quality teachers, administrators *and staff*." Pet. App. A-90 (emphasis added).